

February 13, 2009

**Testimony of Mountain Water Company
House Natural Resources Committee
61st Session of the Montana Legislature
PROPONENT OF HOUSE BILL 379**

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING PERMITTING REQUIREMENTS FOR A MUNICIPAL WATER RIGHT; CLARIFYING THE CHANGE OF APPROPRIATION RIGHT REQUIREMENTS FOR A MUNICIPAL WATER RIGHT FOR WHICH A PERMIT IS NOT REQUIRED; AMENDING SECTION 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

Good afternoon, Chairman Milburn and Committee Members. My name is John Kappes, I am the Assistant General Manager / Vice President of Mountain Water Company, located in Missoula Montana, 1345 W. Broadway. I am here today in support of House Bill 379. This bill is intended to clarify the requirements for a municipal water right.

Mountain Water Company is an investor owned public utility, regulated by the Public Service Commission providing water for domestic, irrigation, fire protection, and sanitation to most of the residents of the City of Missoula and to surrounding Missoula County residents. Mountain Water Company believes the changes proposed by this bill are necessary to protect the water rights that exist to serve the community.

Montana's water law based on the prior appropriations doctrine has become a challenge for municipal water providers as they try to serve growing communities. If a water right is limited to the historical beneficial use of the water right claim, then it becomes almost impossible for communities to add new connections without acquiring new water rights every time a new connection is added.

This seems hard to imagine that the prior appropriations doctrine would now be interpreted to be such a limit to growth, being that it has been the law in Montana for nearly 150 years and throughout history Montana Towns and Cities have been able to have water available for their growth. But as we are all aware, water law seems to be in constant change.

The legislature in 1999, aware of the challenge facing municipalities, passed HB 235 now codified in MCA 85-2-227 protecting municipal water rights from abandonment claims, and then expanded that in 2005. However a new DNRC rule that went into effect January 1, 2005 based on ARM 36-12-1902 created a new challenge. This new rule affected any municipal water supplier when a change was needed for the underlying right and essentially trims back the municipal right to historic use volumes, effectively negating the protection from abandonment under 85-2-227.

Mountain Water first felt the effects in February of 2008 with a 1996 Water Right permit in which the DNRC completed a "Verification Abstract." The permitted volume was 163 acre feet, however because the highest annual volume diverted was only 120 acre feet, the permitted volume was reduced. The well and pump could produce the 163 acre feet, it just had not to date. No consideration was given to the operational and growth issues that require a municipal system to have some additional volume. Effectively 43 acre feet were abandoned.

Another example for Mountain Water relates to a 1957 water right claim which due to contamination of the well, could no longer be pumped. Mountain attempted in 2008 to change this well to two new points of diversion. The DNRC deficiency letter states that the department "must consider historical use in determining whether changing the water right would constitute an enlargement in historical use." The department is requesting usage numbers from 1973 to establish the historical usage, even though Mountain pumped the well through 1992. Looking back to 1973 on a water right to establish historical usage, ignores the development of the right over time by the municipality, causing the municipal water rights owner to lose all the developed right since 1973. This requirement makes no sense, especially when municipal water purveyors have no control over growth.

This bill protects municipal rights from being abandoned through the administrative process. This bill does not exempt municipalities from the permitting process for new water rights. This bill does not exempt municipalities from considering the adverse affects to other water right holders when changes are proposed to an existing water right, such as expanded place of use or new points of diversions. This bill only clarifies that the current municipal rights be allowed to be developed as the right currently states, and as was allowed prior to 2005.

Without this bill, municipalities face the challenge that they may not have the water rights to serve their growth to date, even though the rights say they do. They also face the challenge of not being able to add future growth to utilize their current rights, even though the rights say they do. Without this bill, municipalities will effectively end up abandoning any unused portion of their current municipal rights. Without this bill, communities will face two choices when adding residents to their communities. Apply for new permits by acquiring new mitigation rights. Or avoid the costs of water right mitigation by choosing the exempt well option where each house has its own 35 gpm well. Neither of these choices benefit the community. Mitigating for rights, that were earlier trimmed away, costs the community unnecessary dollars. While the proliferation of 35 gpm exempt wells, when the option of a centralized water system exists, is of no benefit to the community as it increases the threats to public health.

Regulation that encourages development away from centralized water systems, systems which provide rigorous testing of water quality, fire protection, and reliability of service, is regulation that ignores the best interest of the citizens of this state. We believe that the legislature understands the importance of centralized systems and has provided

legislation through out the Montana Codes that support and encourage centralized systems whenever feasible. As mentioned, the legislature has even provided support in the past as relates to centralized systems and their water rights. With this bill, the legislature can correct how the current administration of municipal water rights stands to negate all other legislation that has been put in place to support centralized systems.

This bill is also beneficial to other senior water right holders. Again, the bill does not provide additional water rights to municipalities, nor does it ignore the adverse affects that changes to the rights may have on other users. All it does is recognize the rights the municipalities already have. The proliferation of 35 gpm exempt wells can have a significant impact on all water right holders, and lead to poor resource management. If instead, municipalities can use their existing rights to offset some of these unnecessary exempt wells, the overall water volume per residence can be reduced.

Missoula is a good example. If we assume just a 1% annual growth rate over the next 20 years, this means an addition of 5,000 residences to the system, which is an additional annual volume of approximately 3,000 acre feet. If however, these new residences drilled 5,000, 35 gpm exempt wells, the additional impact to the basin would be 50,000 acre feet of exempt wells. Currently we serve our 23,000 customers with less than 30,000 acre feet. In addition to these higher volumes, if the basin ever did have to conserve on overall water usage, such measures would be much easier with one centralized system than 5,000 individual users.

We thank Representative Hendrick for sponsoring this important piece of legislation. Legislation that aligns the administration of municipal water rights with past legislation that protects municipal rights from abandonment and non-perfection. This protection not only assists cities and towns in the operation of their systems, it prevents future unnecessary nonregulated exempt wells, and continues to encourage the positive choice of centralized water systems when available.

Thank you.